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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

QUANTUM CHEMICAL CORPORATION and
QUANTUM EMPLOYEE STOCK OWNERSHIP PLAN
FOR HOURLY EMPLOYEES,
Petitioners,

v.

RUSSELL WULF, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court intervene to resolve a conflict among the Circuits concerning whether a retirement plan invokes a deferential standard of review if it grants fiduciaries such authority as "conclusive" decision-making power "as to any disputed question"?

2. Should a court disregard relevant Internal Revenue Service positions when it reviews an interpretation of a retirement plan intended to qualify for tax-favored treatment under the Internal Revenue Code?

PARENTS AND SUBSIDIARIES

Quantum Chemical Corporation is a subsidiary of parent corporation Hanson, America, which, in turn, is a subsidiary of Hanson PLC, a British Corporation. Quantum Chemical Corporation has no subsidiaries that are not wholly owned by Quantum.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Quantum Chemical Corporation and Quantum Employee Stock Ownership Plan for Hourly Employees respectfully pray that the Supreme Court of the United States grant a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on June 15, 1994, for which rehearing was denied on July 27, 1994.

OPINIONS BELOW

The majority and minority opinions of the United States Court of Appeals for the Sixth Circuit are reported as *Wulf v. Quantum Chemical Corporation*, 26 F.3d 1368 (6th Cir. 1994). (App. 1a) The district court's judgment, which was written but not reported, was entered

on December 11, 1992. (App. 24a) The United States Court of Appeals for the Sixth Circuit entered an order denying the Petitioners' Petition for Rehearing on July 27, 1994. (App. 32a)

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 15, 1994.

The order of the United States Court of Appeals for the Sixth Circuit denying the Petitioners' Petition for Rehearing was entered on July 27, 1994.

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

29 U.S.C. § 1132(a)(1)(B) Civil Enforcement

(a) A civil action may be brought—

(1) by a participant or beneficiary

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

I. Facts

Quantum Chemical Corporation ("Quantum") operated a plant in St. Bernard, Ohio, as part of its Emery Division. (App. 2a) On January 28, 1988, Quantum adopted several employee stock ownership plans, to give its hourly employees an additional retirement benefit based on the financial performance of the company. During that period, the plaintiffs in this case, who were union-represented

employees at the St. Bernard plant, were participants in the Quantum Employee Stock Ownership Plan for Hourly Employees (the "Plan"). (App. 2a) Quantum provided this Plan coverage at no cost to the plaintiffs: they were not asked to contribute, and their bargaining unit was not asked to surrender any other benefits at the bargaining table.

The Plan is a tax-qualified retirement plan under § 401(a) of the Internal Revenue Code ("Code") and a pension plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 8.01 of the Plan provides that it is administered by a Committee of not less than three members. Section 8.07 of the Plan expressly provides that "the Committee from time to time shall establish rules for the administration of the Plan and the transaction of its business. The determination of the Committee as to any disputed question shall be conclusive." (App. 8a) Section 10.01 of the Plan provides that it "shall be construed . . . under ERISA."

On March 11, 1989, Quantum entered into an agreement to sell the assets of its Emery Division plant in St. Bernard, Ohio, to Henkel Corporation ("Henkel"), effective April 17, 1989. (App. 2a) Section 1 of the Employee Agreement, entered into as a supplement to the asset sale agreement, expressly required Henkel to offer employment to all employees of the St. Bernard facility and to assume the collective bargaining agreement covering hourly union employees at the plant. In addition, pursuant to Section 3(c) of the Employee Agreement, Henkel was required to cause either new or existing trusts funding employee benefit plans to accept transfers of assets and liabilities of all of Quantum's retirement plans attributable to the transferred employees. (App. 2a-3a) After the sale, Henkel continued to operate the St. Bernard plant as a going concern.

The plaintiffs accepted Henkel's employment offer. They continued their employment at the St. Bernard plant

after the sale, as employees of Henkel, in the same jobs and with the same job duties, the same supervisors, and the same hourly wage as they had with Quantum on the previous day. (App. 3a)

After the sale closed on April 17, 1989, and during efforts to complete the transition, Henkel began to resist a transfer of assets from the Plan, even though it proceeded with plan-to-plan transfers from all other Quantum plans. By mid-June of 1989, Henkel announced its refusal to accept transfer. (App. 3a) The Committee determined, that the transferred employees had not experienced a "termination of employment" within the meaning of the Plan. On December 14, 1989, after obtaining Internal Revenue Service approval of the Plan, Quantum's Board of Directors adopted an amendment, retroactively effective to April 15, 1989, that would permit, at the Committee's discretion, distributions to Plan participants involved in a division sale. (App. 3a)

On or about October 10, 1989, Quantum distributed forms to the affected participants on which they could either elect a lump sum payment of their Plan accounts in cash or in stock or elect to retain their accounts in the Plan. (App. 3a) The named plaintiffs elected a lump sum payment in cash. (App. 3a) The final valuation of the accounts for all participants who elected distribution was made on October 31, 1989. (App. 3a) From April 1989 to October 1989, the market price of Quantum shares had dropped substantially.

II. Proceedings Below

Russell A. Wulf and Ronald Rentschler filed this class action in the United States District Court for the Southern District of Ohio under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), alleging that the sale of Quantum's Emery Division to Henkel resulted in their "termination of employment" within the meaning of the Plan and entitled them to distributions as of April

1989. The district court had subject matter jurisdiction pursuant to both ERISA's jurisdictional provision, 29 U.S.C. § 1132(e), and general federal question jurisdiction, 28 U.S.C. § 1331. The parties filed cross-motions for summary judgment. On December 11, 1992, the district court denied the class' motion, granted Quantum's and the Plan's motion, and dismissed the action. The district court ruled that the Plan's terms, the Code, ERISA, and judicial authority did not provide for a distribution upon the Emery sale. In so holding, the district court followed the Internal Revenue Service's ("Service") "same desk rule" to find that "[t]he transfer of a subsidiary or a division in which the employees retain the same job responsibilities, wage, supervisor, etc., is not a 'termination of employment.'" (App. 28a)

The class appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). On June 15, 1994, a divided panel of the Sixth Circuit reversed the grant of summary judgment to Quantum and the Plan and remanded the case with directions to enter summary judgment for the class. (App. 20a) The majority held that the Plan did "not clearly give the Committee that degree of discretion required to invoke deference to the administrator's interpretation of 'termination of employment'" under this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 401 (1989) and subsequent Sixth Circuit authority. (App. 8a-9a) The majority applied a de novo standard of review and concluded that, although the term "termination of employment" was ambiguous and both parties had offered plausible interpretations of the Plan language, the class' interpretation was the "legally correct" one. (App. 15a-17a) The majority, therefore, held that the class had, in fact, "terminated employment" within the meaning of the Plan as of the date of the sale of the Emery Division. In reaching its conclusion, the majority rejected the applicability of the Service's "same desk rule," stating:

> Employers who establish an employee benefit plan subject to ERISA must be aware of tax consequences and must obtain Internal Revenue Service approval of certain features of the plan. This does not mean, however, that tax rulings concerned with treatment of an uncontested right to receive distributions are controlling, or even particularly helpful, in deciding the question of whether the employee is, in the first place, entitled under provisions of a plan to receive the distribution.

(App. 13a) On July 27, 1994, the Sixth Circuit denied Quantum's and the Plan's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 32a)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO PLAN LANGUAGE REQUIRED TO INVOKE A DEFERENTIAL STANDARD OF REVIEW.

More than five years have passed since this Court issued its decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In adopting a two-pronged standard of judicial review for ERISA plan-interpretation decisions, the Court set out to guide courts, plan administrators, and litigants toward a more orderly and consistent system to develop a "body of Federal substantive law . . . to deal with issues involving rights and obligations under private welfare and pension plans." *Id.* at 110-11 (quoting 129 Cong. Rec. 29,942 (1974) (statement of Sen. Javits)). The result, however, has been anything but orderly or consistent. The applicable "body of Federal law" has been dismembered.

In parsing plan language that could invoke a deferential review of plan-fiduciary decisions, the Circuits have produced conflicting expressions of the appropriate test, conflicting rules of construction, and conflicting results under similar plan language. Given the *Bruch* developments to date, the Circuits are compounding, not re-

solving, their differences. Without additional guidance from this Court, the Circuits will remain in fundamental conflict on this important issue of ERISA policy. In addition, that conflict will continue to plague sponsors and fiduciaries of hundreds of thousands of plans (*see* page 16, n.3 *infra*)—sponsors and fiduciaries who are confronted with the ERISA-imposed duty to comply with the terms of their plans, the draconian Code-based threat of plan disqualification, and the reality of burgeoning employee litigation.

A. *Bruch*, Itself.

In *Bruch*, this Court ruled that the decisions of plan fiduciaries should be accorded deference if the plan's language evidenced the necessary grant of decision-making authority of the fiduciaries. The Court noted examples of plan terminology that demonstrated the requisite decision-making authority:

> "any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding"—*id.* at 111;
>
> "power to construe uncertain terms"—*id.* at 111;
>
> "eligibility determinations are to be given deference" —*id.* at 111;
>
> "discretionary . . . authority to construe uncertain terms"—*id.* at 112;
>
> "final authority to construe uncertain terms"—*id* at 112;
>
> "discretionary authority to determine eligibility for benefits"—*id* at 115;
>
> "discretionary authority . . . to construe the terms of the plan"—*id.* at 115.

The Court did not create any presumptions or artificial evidentiary barriers to hinder plan sponsors from choosing deferential review. Nor did the Court find any particular language to be wanting; the informal severance plan at issue contained "no evidence" of fiduciary decision-making

power. *Id.* at 111. Instead, quoting the Restatement (Second) of Trusts § 4, Comment d (1959), it recognized that "[t]he terms of trusts created by written instruments are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible." *Id.* at 112.

B. The "Magic Words" Line.

Several Circuits have recognized that "[t]he Court in *Firestone* surely did not suggest that 'discretionary authority' hinges on incantation of the word 'discretion' or any other 'magic word.'" *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992). Despite paying lip service to that theme, the Sixth Circuit, and a few other Circuits, have come preciously close to just that standard.

In the decision below, the Sixth Circuit articulated a high burden to invoke deferential review, announcing that the grant of authority must be both clear and exceptional. Citing *Anderson v. Great West Life Assur. Co.*, 942 F.2d 392, 395 (6th Cir. 1991), the court announced this test:

> This court has read *Firestone v. Bruch* to hold that discretion is the exception, not the rule and that the arbitrary and capricious standard does not apply unless there is a *clear* grant of discretion to determine benefits or interpret the plan.

(App. 8a, emphasis supplied)

Quantum's Plan easily demonstrates that the settlor had granted broad decision-making authority to the Plan fiduciary. Article 8 of the Plan, entitled "Administration of the Plan," placed in the Committee the "general administration of the Plan and the responsibility for carrying out the provisions of the Plan," and it authorized the Committee to "allocate among themselves all or such portion of their duties . . . as they, in their sole discretion, shall decide." (Sections 8.01 and 8.02, App. 22a) Sec-

tion 8.07, entitled "Establishment of Rules," added the following:

> Subject to the limitations of the Plan, the Committee from time to time shall establish rules for the administration of the Plan and the transaction of its business. *The determination of the Committee as to any disputed question shall be conclusive.* (App. 8a, emphasis added)

Even though the Plan placed no limits whatsoever on the Committee's rule-making authority, except that it not contravene the terms of the Plan, itself, the court below found that the Plan provision "does not clearly give the committee that degree of discretion required to invoke deference." (App. 8a-9a)

In addition, Section 10.04 of the Plan gave the Committee authority to decide what information would be necessary to establish a participant's Plan rights and benefits:

> Each Member or other person entitled to a benefit, before any benefit shall be payable to him or on his account under the Plan, shall file with the Committee the information that it shall require to establish his rights and benefits under the Plan.

Although the court below did not cite that section, it did review other Plan sections, finding that "[n]one of these provisions contains any discretionary language." (App. 8a)

Apparently acknowledging that the Quantum Plan did effectively grant discretion at times, the court below dismissed that evidence of intention with a comment that "[a] plan can give an administrator discretion with respect to some decisions, but not others." (App. 8a) For some, in fact, similar logic has even led to a negative inference: "the settlor's express grant of discretion in certain areas . . . and silence as to others strongly supports the conclusion [that discretion was not intended]." *Luby v. Teamsters Health, Welfare and Pension Trust Funds,* 944 F.2d 1176, 1181 (3d Cir. 1991).

Some Circuits, in fact, have gone so far as to adopt the plan interpretation doctrine of *contra proferentem*, from state law insurance doctrines, favoring the "interpretation that is most favorable to the insured" so that "any ambiguity will be resolved against the drafter." *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir.) *cert. denied*, 489 U.S. 1013 (1909); *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257 (3d Cir. 1993).

Although earlier decisions from the Sixth Circuit indicated a more reasonable application of *Bruch*[1], that Circuit has now shifted toward a very high standard for invoking deferential review. *Tiemeyer v. Community Mutual Ins. Co.*, 8 F.3d 1094, 1099 (6th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1371 (1994) ("Though the instant Plan provides . . . the right to *decide* coverage questions, the Plan does not grant *discretionary authority*); *Anderson v. Great West Life Assur. Co.*, 942 F.2d at 395 (Plan gave insurance company the right to determine the amount of the benefits to which any Participant may become entitled under the Plan").

The *Bruch* cases are legion, and several Circuits have developed inconsistent internal precedent. The following decisions, however, represent Circuits, in addition to the Sixth, that generally apply an exceedingly high standard of fiduciary authorization. They all deny deferential review despite the plan language indicated:

Third Circuit

> *Luby v. Teamsters Health, Welfare and Pension Trust Funds*, 944 F.2d at 1180-81 (plan authorized trustees to "decide upon a program for payment of benefits," gave them "discretion to

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[1] *Johnson v. Eaton Corp.*, 970 F.2d 1569 (6th Cir. 1992); *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244 (6th Cir. 1991).

amend," and "expressly granted Trustees discretionary authority in a number of specified areas")

Heasley v. Belden & Blake Corp., 2 F.3d at 1254 (plan provided that the administrator "will evaluate the proposed admission for certification of medical necessity and appropriateness under the terms of the Master Group Policy")

Eighth Circuit

Baxter v. Lynn, 886 F.2d 182, 188 (8th Cir. 1989) ("plan provides that the trustees have the final authority to determine all matters of eligibility for the payment of claims. As noted above, this section merely describes the trustees' mandatory role in accepting or rejecting claims submitted to the Fund. It does not grant to the trustees the authority to construe ambiguous terms.")

Eleventh Circuit

Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 39 (11th Cir. 1989) ("plan confers upon the trustees 'full and exclusive authority to determine all questions of coverage and eligibility' and 'full power to construe the provisions of [the] Trust' ")

Kirwan v. Marriott Corp. 10 F.3d 784, 788-89 (11th Cir. 1994) (plan "provides that . . . the Named Fiduciary, has 'authority to control and manage the operation and administration of the Plan.' Although the Plan does not specifically grant the Administrator the authority to deny claims, the benefit claim procedure described in the Plan contemplates that the Administrator will perform that function. Finally, . . . the Plan provides: 'The administrator may promulgate such rules and regulations as deemed necessary and proper to interpret or administer the Plan.' ")

C. The "Common Sense" Line.

Several Circuits, on the other hand, have refused to adopt a "magic words" approach or any other artificial barriers to settlor intent. In *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989), the Fourth Circuit responded to the employee's contention that the word "discretion" did not appear in the plan:

> We perceive no principled basis, however, on which we could engage in semantic hairsplitting of that sort. There are obviously no magic words required to trigger the application of one or another standard of judicial review.

Id. at 1187. Preferring a "common sense understanding of the principles enunicated in *Bruch*," *id.* at 1187, the court found the plan's language sufficient:

> [T]he Committee shall have such powers as may be necessary to carry out the provisions of the Plan and to perform its duties hereunder, including, without limiting the generality of the foregoing, the power: . . . To determine all benefits and resolve all questions pertaining to the administration, interpretation and application of Plan provisions, either by rules of general applicability or by particular decisions . . . .

Id. at 1186. The Fourth Circuit had little problem with this issue, noting that "we have before held that language far less broad than that invoked here vests in plan fiduciaries a sufficient measure of discretionary authority." *Id.* at 1187. The reference was to *Boyd v. United Mine Workers Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989) (plan gave administrators the power of "full and final determination as to all issues concerning eligibility for benefits" and the authority "to promulgate rules and regulations to implement" the plan). Given the similarity of the Quantum Plan's language, there can be little doubt that the instant case, if decided by the Fourth Circuit, would have turned out far differently.

Several other Circuits have joined the Fourth Circuit in rejecting a "magic words" analysis and taking a more

"common sense" approach to the *Bruch* standard. The following cases, with the relevant plan provisions, are representative of those Circuits:

District of Columbia Circuit

Block v. Pitney Bowes, Inc., 952 F.2d at 1452-53 (plan vests in the Administrative Committee power "to interpret and construe the Plan, [and] to determine all questions of eligibility and the status and rights of Participants")

First Circuit

Curtis v. Noel, 877 F.2d 159, 161 (1st Cir. 1989) (plan provides that the administrator shall determine "which Employees are eligible to participate in the Plan" and shall "provide all parties dealing with the Plan an interpretation of Plan provisions on request")

Fifth Circuit

Lowry v. Bankers Life & Casualty Retirement Plan, 871 F.2d 522, 524 (5th Cir. 1989) (Retirement Plan gives committee the power to "determine all questions arising" in the administration of the Plan, "including the power to determine the rights or eligibility of Employees and Participants and their beneficiaries, and the amounts of their respective interests" and provides that "Committee determinations are binding on all persons")

Wildbur v. ARCO Chemical Co., 974 F.2d 631 (5th Cir.), *modified*, 979 F.2d 1013 (5th Cir. 1992) (plan says that after reviewing the evidence it believes necessary, the administrator "shall make an independent determination of the applicant's eligibility for benefits under the Plan" and that decision "shall be final and conclusive upon all persons if supported by substantial evidence in the record")

Duhon v. Texaco, Inc., 15 F.3d 1302, 1305 (5th Cir. 1994) (plan states that "[t]he deci-

sions of the Plan Administrator shall be final and conclusive with respect to every question which may arise relating to either the interpretation or administration of this Plan" and that "the Plan Administrator will make the decision to authorize or deny payments")

Seventh Circuit

Donato v. Metropolitan Life Ins. Co., 19 F.3d 375, 379 (7th Cir. 1994) (plan states that MetLife will pay long-term disability benefits "upon receipt of proof, but that [a]ll proof must be satisfactory to us")

Fuller v. CBT Corp., 905 F.2d 1055, 1058 (7th Cir. 1990) (plan empowers trustees "to construe and interpret the plan" but provides that they "shall have no power to add to, subtract from or modify any of the terms of the plan")

Bali v. Blue Cross & Blue Shield Ass'n, 873 F.2d 1043, 1047 (7th Cir. 1989) (plan provided that disability would be "determined on the basis of medical evidence satisfactory to the Committee")

Tenth Circuit

Winchester v. Prudential Life Ins. Co., 975 F.2d 1479, 1483 (10th Cir. 1992) (plan summary stated that the "Claim Administrator[] determines the benefits for which an individual qualifies under the Benefit Plan" and that "the insurance company has the exclusive right to interpret the provisions of the Plan, [and] its decision is conclusive and binding")

Pratt v. Petroleum Production Management Inc. Employee Savings Plan & Trust, 920 F.2d 651, 657 (10th Cir. 1990) (plan gave committee power to "construe and interpret the Plan in accordance with uniform rules and regulations

> . . . , decide the eligibility of any persons to be covered under the Plan in accordance with the Plan . . . [and] determine the right of any person to a benefit, in accordance with the Plan")

Despite several years of extensive development in the Courts of Appeals, the unfortunate fact is that the *Bruch* standard has split along two rapidly diverging lines.[2] In the Sixth Circuit, and a few others, plan sponsors have been frustrated in their obvious effort to provide their fiduciaries with deferential review. As exemplified by the decision below, they have been told, in a few Circuits, that it is not good enough to grant "conclusive" decision-making authority "as to any disputed question." This Court should grant *certiorari* to revisit *Bruch* and to purge the *contra proferentem* doctrine and other artificial presumptions established to frustrate settlor intent. The Court should return this area of law to the "common sense" rule and allow a settlor to ensure deferential review by evidencing an intent to grant the fiduciary decision-making authority. Only then will the courts be relieved of the ever-growing body of litigation, brought in the name of *Bruch*, to second-guess the reasonable exercise of plan fiduciary discretion.

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[2] In addition to the issue raised by this case, the Circuits have split over two other *Bruch* issues. "There is a split among the circuits as to whether a *de novo* review should include facts not before the plan administrator." *Quesinberry v. Life Insurance Co. of North America*, 987 F.2d 1017, 1022-25 (4th Cir. 1993). *Compare Moon v. American Home Assurance Co.*, 888 F.2d 86 (11th Cir. 1989) (review not limited to facts before plan administrator); *with Perry v. Simplicity Engineering, Div. of Lukens General Industries, Inc.*, 900 F.2d 968 (6th Cir. 1990) (review limited to those facts). There is also a split on the issue of whether *Bruch* applies to findings of fact as well as plan interpretations. *Compare Pierre v. Connecticut General Life Ins. Co.*, 932 F.2d 1552, 1556-62 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 453 (1991) (*Bruch* applies to fact determinations); *with Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990) (*Bruch* does not apply).

II. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE CONFLICT CONCERNING THE SIGNIFICANCE OF THE INTERNAL REVENUE CODE AND INTERNAL REVENUE SERVICE POSITIONS IN INTERPRETING TAX-QUALIFIED RETIREMENT PLANS UNDER ERISA.

As recognized by this Court, one of the overriding purposes of ERISA is to create a comprehensive, uniform federal scheme for the regulation of employee benefit plans. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). The individuals and entities charged with the administration of the more than 700,000 [3] qualified retirement plans rely upon, and are controlled by, this uniform federal scheme. When federal courts interpret ERISA plans, however, the relevance of the Code and its interpretive rulings and regulations has been far from uniform. As noted by the Ninth Circuit as early as 1987, "[t]he significance of tax exemption requirements in resolving an ERISA dispute is unclear." *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1257 (9th Cir. 1987). That significance remains unclear today.

To date, the Second, Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits have addressed the plan-interpretation significance of Service regulations and rulings. The Second, Fourth, Ninth and Tenth Circuits, as well as panels of the Fifth and Sixth Circuits, have recognized the important guidance to be gleaned from the Code and from Service rulings and regulations when determining the meaning of an ERISA plan.[4] On the other hand, the Third

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[3] U.S. Dept. of Labor/Pension and Welfare Benefits Administration, Private Pension Plan Bulletin Abstract of 1991 Form 5500 Annual Reports—Preliminary 1991 (Summer 1994).

[4] *See O'Neil v. Retirement Plan for Salaried Employees of RKO General, Inc. and Certain Subsidiary Companies*, No. 93-9038, 1994 U.S. App. LEXIS 27083 (2d Cir. Sept. 26, 1994); *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374 (9th Cir. 1994); *Amato v.*

Circuit, and now the Sixth Circuit in this case, have discounted those regulations and rulings as relevant only to the tax-exempt status of an ERISA plan.[5] To add to the quagmire, a panel of the Sixth Circuit, as well as a panel of the Fifth Circuit, have indicated that Service regulations and rulings may be relevant only to an ERISA plan's tax status, unless the plan indicates that the term in question is to be interpreted in light of the Code and the Service's regulations and rulings (or the parties agree to such an interpretation).[6]

For example, the Second, Third and Sixth Circuits, in deciding whether an ERISA retirement plan was "partially terminated" for plan purposes, reached differing conclusions regarding the role of the Code and its interpretive rulings and regulations. The Second Circuit in *Amato v. Western Union International, Inc.* stated:

> The district court proceeded on the assumption that whether a plan amendment has effected a partial termination must be determined by principles of contract interpretation, not tax rulings, and sua sponte held as a matter of law that no partial termination had occurred. In doing so, it expressly took "no view as to whether the . . . Amendment effected a partial termination under the treasury regulations and revenue rulings cited by plaintiffs." . . . In our view this holding was error, requiring reversal.

Western Union International, Inc., 773 F.2d 1402 (2d Cir. 1985) *cert. dismissed*, 474 U.S. 1113 (1986); *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985); *U.A.W. v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984); *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805 (10th Cir. 1984); *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982).

[5] *See* (App. 13a); *United Steelworkers of America, AFL-CIO and its Local 4805 v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983).

[6] *See Kreis v. Charles O. Townley, M.D. & Associates, P.C.*, 833 F.2d 74 (6th Cir. 1987); *Craig v. Bemis Co.*, 517 F.2d 677 (5th Cir. 1975).

773 F.2d at 1415. In sharp contrast, the Third Circuit in *United Steelworkers of America, AFL-CIO and its Local 4805 v. Harris & Sons Steel Company* rejected the applicability of Service rulings and regulations and found that "[t]he question whether under the terms of the Plan agreement there was a partial termination . . . is essentially one of contract interpretation." 706 F.2d at 1299. The Sixth Circuit, in *Kreis v. Charles O. Townley, M.D. & Associates, P.C.*, although it applied the Code and Service interpretations, apparently would not have done so had the parties not agreed to their relevance:

> It is important to note that, in the absence of agreement between the parties that the use of the term "partial termination" in the Plan was meant to adopt the "partial termination" standards in the Internal Revenue Code, the Internal Revenue Code standards might be irrelevant.

833 F.2d at 79, n. 10 (citing *Harris & Sons Steel Co.*, 706 F.2d at 1297-99).

Thus, there is conflicting jurisprudence, both direct and in principle, on the significance of tax exemption requirements in interpreting ERISA plans. This conflict arises not only among the Circuits, but among different panels of the same Circuit as well. This issue has been thoroughly examined by the lower courts and is now ripe for review in this Court. Without this Court's intervention, the lower courts will remain in a state of confusion on this important issue.

As this Court has stated, to decide ERISA issues by pretending that the Code and the Service do not count is "to embark upon a voyage without a compass." *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1991). To reject the guidance of the Code and the Service, as did the majority of the Sixth Circuit in the instant case, is, therefore, fundamentally flawed, for it inexplicably ignores ERISA's historical roots in tax regulation. In the historic 1974 legislation, Title II of ERISA revamped the tax reg-

ulation of employee retirement plans, and those provisions were codified under Title 26 of the United States Code. 1974 U.S. Code Cong. & Admin. News 1020-1139. Title II of ERISA included major revisions of Code section 401, the Code's primary tax-qualification provision, and many other sectons of Subchapter D, Part I of the Code. In other words, many key Code sections are an integral part of ERISA and must, therefore, be considered in construing an employee benefit plan.[7]

As recognized by the Tenth Circuit in *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, the "enforcement duties and responsibilities under ERISA are divided between the United States Department of Labor and the Internal Revenue Service" and the "applicable laws are set out in 29 U.S.C. § 1001-1144 and in the Internal Revenue Code §§ 401-415." *Id.* at 808. Thus, the "uniform scheme of federal regulation" contemplated under ERISA includes not only the labor provisions in Title 29 of the United States Code, but the tax provisions in Title 26 as well. *See Crouch*, 740 F.2d at 809 (Tenth Circuit used the Code's nondiscrimination and coverage rules for guidance to interpret the coverage of a pension plan). *See also U.A.W. v. Dyneer Corp.*, 747 F.2d 335 (Sixth Circuit analyzed Service positions to determine whether plaintiffs were entitled to early retirement benefits under an ERISA plan).

To require plan administrators to interpret ERISA plans without at least one eye toward the Code's require-

[7] In the instant case, the Service's interpretations of key Code sections breathe meaning into the term "termination of employment." Revenue Ruling 79-336, 1979-2 C.B. 187, and Revenue Ruling 81-141, 1981-1 C.B. 204, applied Code subparagraph 402(e)(4)(A), which was contained in its entirety in Title II of ERISA. 1974 U.S. Code Cong. & Admin. News 1020, 1130-32. Private Letter Ruling 8614060 (June 13, 1986), applied the "same desk rule" under Code section 401(a), which was amended extensively by Title II of ERISA. 1974 U.S. Code Cong. & Admin. News 1020, 1058, 1066-70.

ments creates an irreconcilable conflict for ERISA plan fiduciaries, who must attempt to comply with both statutes. To take the position, as have some Circuits (including the Sixth in the instant case) that the Code and its interpretations must not be relevant to the interpretation of plans, ignores the critical importance of tax-favored treatment for those plans. *See United Steelworkers of America, AFL-CIO and its Local 4805 v. Harris & Sons Steel Company*, 706 F.2d 1289 (Third Circuit stated that fact that there may be a partial termination of a qualified plan for purposes of the Code does not mean that plan was "partially terminated" under its language, as tax precepts governing partial termination serve only a limited purpose); *Craig v. Bemis Co.*, 517 F.2d at 686 ("Fifth Circuit found that [a] specific indication of an intention to use the provisions of the Internal Revenue Code to interpret or define terms of the contract is absent. Given this absence, it seems fairly clear that the tax provisions are relevant only to the tax status of the Plan. . . . [W]e conclude that while the tax status of the Plan may be of concern to the Company and the Commissioner of Internal Revenue, plaintiffs may not predicate their contractually-derived pension rights on the Company's tax exemptions.")

While it is true that the Code does not create substantive, enforceable rights to benefits under ERISA, that is not the point. The point is that Code-influenced vocabulary is the "compass" that plan administrators regularly use to navigate the waters of ERISA. For a court to reject and give no weight to the substantial body of federal law from the Code and the Service is to operate in an environment totally foreign to plan sponsors and fiduciaries, who must live day-to-day with the ever-present risk of plan disqualification. As Judge Kennedy noted in her dissent in the instant case:

> I am unable to agree that the tax cases relied on by the District Court are not helpful. The Internal Revenue Code, subsection 401(a), governs whether an

> employee's stock ownership plan, or any other retirement plan, is qualified for tax-favored status. Plan administrators must comply with Revenue Rulings which do not consider an employee "separated from service" where he or she continues in the same job for another employer. Rev. Rul. 79-336, 1979-2 C.B. 187 and Rev. Rul. 81-141, 1981-1 C.B. 204. The Plan had to comply with tax laws to be approved so contributions could be deductible.

(App. 23a)

The illogical consequences that can result are aptly illustrated by the instant case. In Revenue Ruling 67-213, 1967-2 C.B. 149, the Service ruled that, when funds are transferred directly between the trustees of exempt trusts, both of which form part of qualified plans, the accounts transferred are not treated as having been "distributed" to participants. Quantum and Henkel originally agreed to just such a transfer of the class' assets in the Plan, and Quantum did, in fact, transfer to Henkel assets from its other retirement plans.

Plan-to-plan transfers in corporate asset sales have been common occurrences for the last 27 years. Not only are they permissible under the Code, they are a form of portability that Congress and the Service have clearly preferred in fashioning federal retirement policy. The Sixth Circuit's holding in the instant case, however, necessarily means that Quantum and the Plan fiduciaries *could not have legally transferred the plaintiffs' assets* to a Henkel plan, because the majority concluded that the plaintiffs had an absolute legal right to force a Plan distribution as of the date of the sale. That astounding result, which calls into question the legality under ERISA of almost every plan-to-plan transfer arising out of an asset sale, reveals the fundamental error in the majority's approach.[8]

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[8] That a plan-to-plan transfer, unlike a distribution, would have served a major purpose of the Plan, the Code and ERISA—that is,

The role of an ERISA plan administrator is a daunting one, fraught with pitfalls arising out of the complexities of ERISA and the Code. Under the current confusing state of judicial precedents, ERISA plan administrators have no idea what role, if any, the Code and the Service's rulings and regulations play in interpreting the terms of an employee benefit plan. ERISA plan administrators need this Court's guidance on this critical issue. And plan participants need it, as well; they often face the risk, as here, that an adverse judgment against a plan will reduce the assets available to remaining participants. Without this Court's guidance, they face, as Quantum's fiduciaries and remaining Plan participants have now experienced, the Hobson's choice of potential ERISA liability versus potential plan disqualification.

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preserving Plan accounts to provide retirement income to the plaintiffs *when they reach retirement age*—was another critical factor that the majority below ignored in intepreting the Plan. The Plan is, after all, an ERISA "pension plan," 29 U.S.C. § 1002(2), and it explicitly recognizes that status in many of its provisions, such as sections 3.03, 7.09, 11.02 and 12.01.

CONCLUSION

For the reasons stated above, Petitioners Quantum Chemical Corporation and Quantum Employee Stock Ownership Plan for Hourly Employees request this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals of the Sixth Circuit.

Respectfully submitted,

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October 25, 1994

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3061

RUSSELL WULF and RONALD RENTSCHLER,
Plaintiffs-Appellants,

v.

QUANTUM CHEMICAL CORPORATION;
QUANTUM EMPLOYEE STOCK OWNERSHIP PLAN FOR
HOURLY REPRESENTED EMPLOYEES,
Defendants-Appellees.

March 11, 1994, Argued
June 15, 1994, Decided
June 15, 1994, Filed

On Appeal from the United States District Court
for the Southern District of Ohio
District No. 91-00036—S. Arthur Spiegel, District Judge

Before: KENNEDY and MILBURN, Circuit Judges; and LIVELY, Senior Circuit Judge. LIVELY, Senior Circuit Judge, delivered the opinion of the court, in which MILBURN, Circuit Judge, joined. KENNEDY, Circuit Judge, delivered a separate dissenting opinion.

OPINION

LIVELY, Senior Circuit Judge. This is an ERISA (Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.) case in which the district court granted summary judgment to the defendants upon concluding that the plaintiffs did not suffer a "termination of employment" when their employer sold the division where they worked. After a period of discovery, the parties filed cross-motions for summary judgment. The district court denied the plaintiffs' motion, granted that of the defendants, and dismissed the action.

I.

The defendant Quantum Chemical Corporation sold its plant at St. Bernard, Ohio to Henkel Corporation on April 17, 1989, as part of the sale of its Emery Division. The plaintiffs were employed by Quantum at the St. Bernard plant at the time of the sale and were participants ("Members") in the Quantum Employee Stock Ownership Plan for Hourly Represented Employees (the Plan or ESOP). Section 7.01 of the Plan provides that "[u]pon a Member's termination of employment the Vested Portion of his Account shall be distributed as provided in this Article" (Article 7, "Distribution of Accounts"). Section 7.03 provides, as applicable here, for distribution of the vested portion to be made "as soon as administratively practicable following . . . the Member's termination of employment." This section also provides that a terminated employee may elect "to have his distribution commence as of a Valuation Date coincident with or next following . . . his termination of employment. . . ." Although the Plan uses "termination of employment" throughout Article 7, that term is never defined.

The sales agreement required Henkel to offer employment to employees of the Emery Division. In addition, the sales agreement called for Henkel to cause either new or existing trusts funding employee benefit plans to accept

transfers of assets and liabilities from all of Quantum's retirement plans, including the defendant Plan, attributable to employees accepting Henkel's offer of employment. After the sale, however, Henkel refused to accept the transfers of assets and liabilities of the Plan. Quantum subsequently amended Section 7.03 of the Plan on December 14, 1989, retroactively effective to April 15, 1989, to provide for the distribution of plan proceeds to plan participants in the event that Quantum, or a subsidiary of Quantum, sold substantially all of its assets and the plan participants continued employment with the purchaser.

The hourly employees at the St. Bernard plant were hired by Henkel and continued to perform the same duties at the same wages, in the same location and under the same supervisors. Quantum determined that no termination of employment occurred at the time of the sale and that the plaintiffs were entitled to distribution of their accounts in the Plan only by reason of the amendment.

Quantum elected to distribute the proceeds of the Plan in the latter part of 1989. In preparation for that distribution, application forms were distributed in October 1989 to Emery Division employees rehired by Henkel. These forms gave the plan participants a choice: to retain their accounts in the Plan or have their account balances distributed in lump sum payment of cash or stock. The named plaintiffs elected a lump sum payment of their accounts in cash. Quantum made the requested distributions in December 1989. The dispute that resulted in this law suit is over the date on which the accounts' balances were valued. Quantum valued the accounts for distribution purposes on October 31, 1989, more than six months after the sale. The value of the accounts on April 17, 1989, the date of sale, was substantially higher. In fact, if the distribution had been valued on the date of sale, the amount distributed would have been $573,477 more than Quantum actually distributed in December.

II.

The plaintiffs filed this ERISA action under 29 U.S.C. § 1132(a)(1)(B), which provides that a civil action may be brought by participants in a plan governed by ERISA "to recover benefits due [them] under the terms of the plan." The district court eventually certified the case as a class action on behalf of "those persons employed by Quantum Chemical Corporation at its Saint Bernard plant who were participants in its hourly employee ESOP plan immediately prior to April 17, 1989."

A.

In their complaint, which named Quantum and the Plan as defendants, the plaintiffs alleged that the vested portions of their accounts should have been valued and distributed to them in April 1989. This claim was based on the contention that the sale of the Emery Division to Henkel resulted in a termination of their employment on April 17, 1989.

The defendants admitted that the plaintiffs were participants in the Plan until the date when their accounts were distributed to them, and that the plan was subject to ERISA. They denied that the plaintiffs' employment was terminated as of April 17, 1989, and denied any wrongdoing in valuing the plaintiffs' accounts for distribution as of October 31, 1989.

B.

As exhibits to their motion for summary judgment the plaintiffs filed copies of two communications from Quantum. Exhibit A was an undated letter on Quantum stationery addressed to "Dear Quantum Employee." The letter appears to have been sent to the employees in January 1988, as it referred to Quantum's 1987 earnings. The letter announced the company's decision to form the ESOP and stated that Quantum was contributing a profit sharing bonus in the form of Quantum stock to an ac-

count "in your name." The letter explained that the stock bonus awards depended on Quantum's success and were granted as an incentive for employees to continue efforts in the future that contributed to that success. Referring to distribution, the letter stated, "You receive the value of your account when you leave Quantum, if you have two years of service at that time."

Exhibit B, dated April 29, 1988, was a newsletter titled "Profit Sharing Stock Bonus Plan." It referred to the earlier announcement of creation of the ESOP and again described the Plan as "an incentive to continue the hard work and enthusiasm that have brought us this success." The document described in some detail how the bonus plan worked, how values of contributions were computed and the relationship between market value of Quantum stock, which funds the ESOP, and individual employee's accounts. In two places this communication used the same "when you leave Quantum" language found in the earlier letter. The plaintiffs argued at the summary judgment hearing that statements in the newsletter clearly advised that membership in the Plan depended on being employed by Quantum.

The plaintiffs also filed an affidavit in which they alleged that Quantum's personnel officer Richard Neff had told Emery Division employees prior to the sale to Henkel that their ESOP shares would be valued and distributed as of the last day of the month of the sale.

C.

In support of their motion for summary judgment the defendants relied on the Plan itself, as amended, and documents exchanged between Quantum and Henkel in connection with the sale of the Emery Division. The defendants argued that the plaintiffs and similarly situated employees did not experience a termination of employment upon the sale of the Emery Division. This being so, the defendants continued, the Plan contained no au-

thorization for distribution to the plaintiffs of the value of their ESOP accounts based upon sale of a division until Quantum amended the Plan to provide specifically for such a distribution.

Quantum asserted that the brief descriptions of the Plan and of participants' rights contained in the exhibits did not define or enlarge the rights of participants or the obligations of Quantum or the Plan administrator, a committee of three persons not affiliated with Quantum. They took the same position with respect to Neff's alleged statements, which he denied making when he gave his deposition. Quantum argued that it acted within its discretion in choosing the October 31, 1989, valuation date and that the plaintiffs and their class had no claim for damages based on the decline in value of Quantum stock between April and October.

III.

In its order granting the defendants' motion for summary judgment, the district court agreed that the Plan did not require the defendants to distribute funds or value the plaintiffs' accounts as of the date of the sale to Henkel. The court stated that the transfer of a subsidiary or division in which employees retain the same job responsibilities and work for the same wages under the same supervisors does not effect a termination of employment. In order for the transfer to Henkel's payroll to qualify as a termination, the court stated, the employees would be required immediately after the sale either to assume new responsibilities with the new employer or actually to saver that employment relationship.

The district court also held that representations in the "summaries" circulated to the employees by Quantum were not binding interpretations of the term "termination of employment." The documents did not qualify as Summary Plan Descriptions (SPDs) required to be furnished to plan participants by 29 U.S.C. § 1022(a)(1) because they contained only a few of the items of information set

forth in § 1022(b). The district court recognized that language in an SPD that conflicts with language of a plan will prevail over plan language, but held that the two documents in question did not qualify for this treatment. In addition, the court stated that the "imprecision of language" in the documents precluded a finding that the documents defined "termination of employment." Further, the court found that the plaintiffs had produced no evidence that they relied upon or changed their positions in any way based on Neff's alleged statements. Thus, any inconsistency between his oral representations and the language of the Plan would not bind Quantum under an estoppel theory.

IV.

The district court did not indicate in its order what standard of review it applied in determining that the plaintiffs had not experienced a termination of employment.

A.

For a number of years after the passage of ERISA, many courts, including this one, accorded deference to a plan administrator's decisions respecting claims for benefits, reviewing these decisions under an arbitrary and capricious standard. See Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623, 626 (6th Cir. 1987) and cases cited therein.

The Supreme Court has now mandated a different approach with respect to actions challenging benefit eligibility determinations brought under 29 U.S.C. § 1132(a)(1)(B), the statutory basis of the present action. The Court held in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989), that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Thus, a re-

viewing court should first examine the plan to determine whether or not the required discretion has been given.

This court has read Firestone v. Bruch to hold that discretion is the exception, not the rule and that the arbitrary and capricious standard does not apply unless there is a clear grant of discretion to determine benefits or interpret the plan. Anderson v. Great Western Life Assurance Co., 942 F.2d 392, 395 (6th Cir. 1991). Furthermore, "discretion is not an all-or-nothing proposition. A plan can give an administrator discretion with respect to some decisions, but not others. . . . A plan administrator has exactly the amount and type of discretion granted by the plan, no more, and no less." Id.

The defendants rely on § 8.07 of the Plan as granting discretion to the committee that functioned as administrator of the Quantum Plan sufficient to invoke an arbitrary and capricious standard in reviewing the committee's determinations in the present case. Section 8.07 reads as follows:

> 8.07 Establishment of Rules
>
> Subject to the limitations of the Plan, the Committee from time to time shall establish rules for the administration of the Plan and the transaction of its business. The determination of the Committee as to any disputed questions shall be conclusive.

This section is included in Article 8, "Administration of the Plan." Other articles and sections deal with valuation (§ 4.02), valuation date (§ 1.32) and distribution of accounts (Article 7). None of these provisions contains any discretionary language.

B.

Applying the rules of construction enunciated in Anderson v. Great Western, we conclude that the Plan does not clearly give the committee that degree of discretion re-

quired to invoke deference to the administrator's interpretation of "termination of employment." This being so, the district court should have, and we must, review the committee's determination to deny the plaintiffs' claim under a de novo standard, "applying trust principles." Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 550 (6th Cir. 1989). Using this standard a court "is bound by the provisions of the documents establishing an employee benefit plan 'without deferring to either party's interpretation.'" Id. (quoting Firestone v. Bruch, 489 U.S. at 112).

We have carefully considered the defendants' arguments in favor of applying an aribtrary and capricious standard of review. We recognize that no incantation of the magic word "discretion" is necessary and that courts have held language such as "determination . . . as to any dispirited questions shall be conclusive" to grant discretion sufficient to shield such determinations from de novo review. Nevertheless, each plan must be read in its entirety and language claimed to create the required degree of discretion must be examined in context. Bearing in mind that a grant of discretion is not "an all-or-nothing proposition," we conclude that § 8.07 is properly construed to mean that conclusiveness of the committee's determination is limited to disputes over the meaning and application of any rules it might establish pursuant to the first sentence of that section. Section 8.07 clearly deals with rules for administration of the Plan, not with interpretation of the language of the Plan. As Anderson v. Great Western teaches, once an administrator is found to have a degree of discretion under a plan, the reviewing court must determine "the exact contours of the discretionary authority." 942 F.2d at 395. The placement of the reference to finality of the committee's determinations of disputed questions in the section granting authority to make rules does not indicate a clear grant of discretion to interpret the language of the Plan generally.

In Johnson v. Eaton Corp., 970 F.2d 1569 (6th Cir. 1992), the plan gave the administrator authority to establish rules for its administration and to determine applications of the rules. Although the court found that the plan did give sufficient discretion to invoke review under the arbitrary and capricious standard, the court did not rely principally on this rule-making authority. The plan in that case also gave the administrator power to review denial of claims and provided that its decisions would constitute the "final disposition" of a claimant's case. Id. at 1572.

The United States Court of Appeals for the Eleventh Circuit recently reached the same conclusion we do here in construing a plan that gave the administrator "authority to control and manage the operation and administration of the Plan" and the authority to "promulgate such rules and regulations as deemed necessary and proper to interpret or administer the Plan." Kirwan v. Marriott Corp., 10 F.3d 784, 788 (11th Cir. 1994). In holding that this language "falls short of the express grant of discretionary authority necessary to trigger the arbitrary and capricious standard of review," the court held that the grant of authority to promulgate rules and regulations is "merely a grant of administrative powers." Id. at 788-89.

It is clear to us that the provisions of § 8.07 amount to nothing more than a grant of authority to make rules for the administration of the Plan, with the provision that the committee's decision respecting any dispute as to the meaning or application of the rules is final. Section 8.07 does not clearly give the committee discretion to interpret the language of the Plan.

V.

Having determined the proper standard, we begin our de novo review with the language of the Plan, the starting point for interpreting any written instrument.

A.

Article 2 defines membership in the plan. Section 2.01 states that each full-time employee, subject to a minimum length of service not applicable here, is a "Member" of the Plan. "Employee" is defined in § 1.14 to mean "any person regularly employed by an Employer who receives regular stated compensation . . . on an hourly wage basis . . . and who is included in a unit covered by a collective bargaining agreement." "Employer" is defined in § 1.15 as "the Company" and certain subsidiaries and associated employers. Section 1.09 defines "Company" as follows:

> "Company" means Quantum Chemical Corporation, a Virginia corporation, or any successor by merger, consolidation, share exchange or similar type of corporate reorganization, or any entity that acquires the properties and assets of Quantum Chemical Corporation substantially as an entity, provided such entity expressly assumes all of the obligations of the Quantum Chemical Corporation under the Plan.

Section 2.04 provides that membership terminates on a "Member's Severance Date unless the Member is entitled to benefits under the Plan, in which event his membership shall terminate when those benefits have been distributed to him in full." "Severance Date," in turn, is defined as "the date an Employee quits, retires, is discharged or dies . . . ." § 1.26. Distribution of Accounts is covered in Article 7. Section 7.01, "Eligibility" provides in subsection (a) that distribution shall be made "[u]pon a Member's termination of employment," and § 7.03 requires distribution to be made "as soon as practicable following . . . the Member's termination of employment."

B.

The defendants argue that none of the provisions set out above, when applied to the facts of this case, leads to the conclusion that the plaintiffs were entitled to distributions valued as of April 1989 on the basis of the

sale of Henkel. They contend that the sale did not terminate the plaintiff's employment within the terms of the Plan. It was only when Quantum amended the Plan to provide for distribution in the event of sale of a division that these employees became eligible for distributions.

The plaintiffs maintain that they were no longer "Employees" of their "Employer" following the sale, and thus the sale terminated their employment within the meaning of the Plan. As terminated employees, they no longer qualified as "Members" of the Plan and were entitled to distributions based on a termination date of April 17, 1989. Section 1.32 defines "Valuation Date" as the last business day of each calendar month. Thus, the plaintiffs argue, their shares should have been valued as of April 30, 1989. Because the plaintiffs were entitled to distributions under the Plan as it stood at the time of their termination, the amendment that referred to the sale of subsidiaries and gave the committee new discretion as to distribution of a member's account in such an event could not affect the plaintiffs' rights.

VI.

A.

The district court relied heavily upon tax cases in concluding that the plaintiffs were not terminated from employment. See Miller v. United States, 683 F. Supp. 166 (W.D. Tex. 1987); United States v. Haggart, 410 F.2d 449 (8th Cir. 1969); United States v. Johnson, 331 F.2d 943 (5th Cir. 1964). The issue in all of those cases was the tax treatment that lump sum payments from an employer should receive. The employees were entitled to distributions when their employer sold the business or part of the business where they worked; entitlement was not an issue. The cases cited by the district court held that an employee who works at the same job in the same location, and at the same wages, but who receives a distribution from an employee benefit plan because of the change

of employer, is subject, for tax purposes, to the "same desk rule." Under this rule the distribution is not entitled to preferential tax treatment because the employee has not been "separated from service."

Employers who establish an employee benefit plan subject to ERISA must be aware of tax consequences and must obtain Internal Revenue Service approval of certain features of the plan. This does not mean, however, that tax rulings concerned with treatment of an uncontested right to receive distributions are controlling, or even particularly helpful, in deciding the question of whether the employee is, in the first place, entitled under provisions of a plan to receive the distribution.

The district court also cited our decision in Board of Education of Muhlenberg County v. United States, 920 F.2d 370, 375-76 (6th Cir. 1990). In Muhlenberg Co. we held that teachers who worked for separate school districts maintained "continuing current employment" for purposes of a Medicare tax exemption when their districts were consolidated. The court based its decision largely on the legislative history of an amendment to the Medicare Act which provided temporary relief from the Medicare tax at the time states and political subdivisions were first brought under the Act. The tax consequences to the employees from being brought under Medicare was not an issue in Muhlenberg Co.; it was the tax burden on the employer that was contested. We do not believe this case can be decided by applying generalized holdings and dicta in non-ERISA cases.

The district court also relied on two ERISA cases in determining that the plaintiffs were not terminated from employment. In Harper v. R.H. Macy & Co., Inc., 920 F.2d 544 (8th Cir. 1990), the court found that former employees of Macy's who were accepted immediately for employment by the purchaser of the stores in which they worked were not entitled to severance pay. The Macy benefit plan granted severance pay to employees who were

"permanently terminated." After conducting a de novo review, the Harper court found that the purpose of the plan was to provide help to workers who lost their jobs during their period of unemployment. Since none of the plaintiffs were unemployed, they did not qualify for these benefits as "permanently terminated" employees.

The district court also cited Wildbur v. The Atlantic Richfield Retirement Plan, 765 F. Supp. 891 (W.D. La. 1991), as support for its determination that the plaintiffs were not terminated from employment. We do not consider this case inasmuch as the court of appeals vacated the district court's decision for failure to explain in sufficient detail its determination to grant summary judgment. 974 F.2d 631, 644 (5th Cir. 1992).

B.

Both parties have cited ERISA cases in addition to those relied upon by the district court. We have examined these decisions, and others not cited by the parties, but find them of little help. Each case subject to de novo review turns on interpretation of specific language contained in a qualified plan. The language claimed to trigger entitlement to benefits must be construed in light of the entire plan. Plans that contain restrictive language such as "permanently terminated" or "laid off" rather than simply "terminated from employment" are inapplicable to our determination and furnish little guidance. Similarly, cases involving severance pay and plans that require "separation from service" do not persuade us. These plans grant payments to offset the effects of unempolyment, while the Quantum Plan has a different purpose.

We stated in Adams v. Avondale Industries, Inc., 905 F.2d 943, 950 (6th Cir.), cert. denied, 498 U.S. 984 (1990), that "courts should proceed carefully before applying rules developed specifically to ferret out arbitrary and capricious action when interpreting the terms of a plan de novo." (citations omitted). Many of the cases

we have examined were decided under the arbitrary and capricious standard; thus, they have limited, if any, applicability.

C.

The question of whether the language of the Plan is ambiguous is a question of law requiring de novo review. Boyer v. Douglas Components Corp., 986 F.2d 999, 1003 (6th Cir. 1993). The language is ambiguous if it is subject to two reasonable interpretations. Smith v. ABS Indus., 890 F.2d 841, 846-47 n.1 (6th Cir. 1989) (quoting International Union, UAW Local 91 v. Park-Ohio Indus., 876 F.2d 894 (6th Cir. 1989) (unpublished per curiam) ("Both parties have offered plausible interpretations of the agreement drawn from the contractual language itself [which] demonstrates that the provision is ambiguous.")).

The phrase at issue in this case is ambiguous. Both parties have offered plausible interpretations of the Plan language, and there is authority supporting either construction. Because the language in the Plan is reasonably susceptible to either interpretation, we may look at any extrinsic evidence available.

> If the plan documents are ambiguous with respect to a particular term, then, under federal common law, a court may use traditional methods of contract interpretation to resolve the ambiguity, including drawing inferences and presumptions and introducing extrinsic evidence.

Boyer v. Douglas Components, 986 F.2d at 1005 (citing In re White Farm Equipment Co., 788 F.2d 1186, 1193 (6th Cir. 1986)). When interpreting a contract, courts look not only at the language, but also for additional evidence that reflects the intent of the contracting parties. See Firestone v. Bruch, 489 U.S. at 112-13.

Unlike some courts, we have held that a court conducting a de novo review in an ERISA case is confined

to evidence that was included in the record upon which the administrator based its decision. Perry v. Simplicity Engineering, 900 F.2d 963, 966 (6th Cir. 1990). This rule does not prevent our looking at the two communications about the Plan from Quantum to the Emery Division employees. Because these documents are part of the administrative record they may be considered in our de novo review.

The ESOP was created unilaterally by Quantum and this makes it somewhat difficult to determine "the true 'intention' of the parties." Taylor v. Continental Group, 933 F.2d 1227, 1232 (3d Cir. 1991) (citation omitted). "In this situation, the reasonable understanding of the beneficiaries, as well as the intent of the employer, may be admissible to clarify ambiguities." Id. We believe in this case "the reasonable understanding of the beneficiaries"—i.e. the employees—can be ascertained. The employees were never given copies of the Plan but derived their understanding of the Plan from the two documents [1] that were distributed to them by Quantum: the "Dear Quantum Employee" letter and the "Profit Sharing Stock Bonus Plan" newsletter. As pointed out earlier, both of these documents told the employees that their accounts would be distributed to them when they "left Quantum." As the plaintiffs have repeatedly stated, they believed that when they began to work for Henkel, they had left Quantum and were entitled to their distributions.

The defendants claim that it was never their intention to make a distribution upon the sale of a division. According to Quantum, they did not believe they were even permitted to make a distribution under the Plan because sale of a division was not equivalent to termination. However, although the defendants now claim that they never

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[1] The fact that the two documents did not qualify as SPDs is immaterial. We use their content to clarify the meaning of the Plan, not to contradict it.

intended "termination" to include a division sale, the evidence in the record indicates otherwise.

The purpose of the Stock Bonus Plan was motivational: the promise of a bonus commensurate with the success of the company would inspire the employees to increase productivity. To keep an employee as a participant in this plan after the employee left the company would in no way further that purpose. Therefore, the letter said, "You receive the value of your account when you leave Quantum."

Based on these statements, which were voluntarily distributed by the company, it is reasonable to infer that the "employment" relationship that was of primary concern to Quantum was the "employment" with Quantum. According to the newsletter, Quantum wanted to provide "all employees with ownership of the company." The plan defines "Employees" as employees of Quantum. Therefore, when that employee/employer relationship was severed, "employment" had been terminated.

VII.

The determination that the change in the plaintiffs' status following sale of the Emery Division to Henkel constituted a termination of employment does not end our inquiry. Acting pursuant to a right reserved in the Plan, Quantum amended the Plan in December 1989, effective April 15, 1989, to provide for distributions. in its discretion, to employees of a subsidiary sold by Quantum who are hired by the purchaser. Quantum argues that the Plan did not permit a distribution based on a sale of corporate assets constituting a division until this amendment was adopted. The question is whether this retroactive amendment could diminish the amount of the distributions the plaintiffs would have received if they were entitled to have their distributions valued as of April 30, 1989.

An employer may amend or terminate an employee welfare benefit plan at any time and, in doing so, the employer does not act as a fiduciary. Adams v. Avondale Industries, 905 F.2d at 947. Benefits under a welfare benefit plan do not vest as a matter of law under ERISA. Id. Nevertheless, "the parties may themselves set out by agreement or by private design, as set out in the plan documents, whether . . . welfare benefits vest, or whether they may be terminated." In re White Farm Equipment Co., 788 F.2d 1186, 1193 (6th Cir. 1986). The Quantum Plan does provide in § 6.01 that "[a] Member shall become 100% vested in his Account upon his completion of two years of Vesting Service." Section 1.34 defines "Vesting Service" as the period of an employee's employment by Quantum or an affiliate, beginning with his first hour of employment and ending with the employee's severance date. Thus, as to the plaintiffs and members of the certified class who had two years of vesting service the question remains whether the retroactive amendment can have the effect of diminishing the value of their accounts for distribution purposes below the April 30, 1989, value.

Even though Quantum had the right to amend the Plan and was not acting as a fiduciary in doing so, Quantum's argument requires us to answer the question of whether the plaintiffs' contractual right to distribution, triggered by the April 17 sale to Henkel and resulting termination of their employment, could be denied them by reason of an amendment back-dated to be effective two days before the sale. The district court did not reach this question, having determined that there was no termination by reason of the sale itself.

As the Supreme Court pointed out in Firestone v. Bruch, "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans' . . . 'and to protect contractually defined benefits.' " 489 U.S. at 113 (citations omitted). The distribution rights

under the Plan are "contractually defined benefits." We conclude that the amendment cannot have the effect of diminishing the value of accounts of those members of the plaintiff class that have vested.

Quantum adopted this amendment pursuant to its reserved powers under § 11.01 of the Plan. Section 11.01, in pertinent part, provides that

> The Board of Directors reserves the right at any time from time to time, and retroactively if deemed necessary or appropriate, to amend in whole or in part any or all of the provisions of the Plan. . . . No amendment shall be made which has the effect of decreasing the balance of the Account of any Member . . . .

(emphasis added). Clearly, Quantum had the right to make this amendment and to apply it retroactively. Under the terms of the Plan, however, this amendment cannot be used to decrease account balances. Thus, the value of account balances of those Emery Division employees who were terminated by the sale and who chose lump sum settlements were fixed as of April 30, 1989, and the December amendment could not decrease or diminish them.

Even if § 11.01 did not contain the prohibition against an amendment decreasing account balances, Quantum's act of amending the Plan after the sale and after the plaintiffs had filed their applications for distribution would raise a serious question. As then Chief Judge Hillman stated in Edward W. Sparrow Hospital Ass'n, Inc. v. Industrial Welding, Inc., 1990 U.S. Dist. LEXIS 9194 (W.D. Mich., July 19, 1990), "Once a participant became entitled to coverage under the then existing terms of the Plan, it would be entirely illusory to allow [the employer] to essentially divest them of that right by retroactively deleting the benefit." Id. at *20. We do not imply that Quantum acted improperly in adopting the December amendment. As a matter of law, however,

given our interpretation, the amendment cannot have the effect that Quantum seeks.

The judgment of the district court granting summary judgment to the defendants is REVERSED and the case is REMANDED with directions to enter judgment for the plaintiffs. The district court will determine which class members' account balances were vested on April 17, 1989, and value those accounts.[2]

CORNELIA G. KENNEDY, Circuit Judge, dissenting.

Because I conclude that the Plan at issue in this case is of the kind that clearly gives the administrator discretion "to determine eligibility for benefits or to construe the terms of the plan," Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), I respectfully dissent.

Section 7.01(c) of the Plan was amended in December 1989, retroactive to April 15, 1989, to provide:

> [i]n the event of the termination of the Plan without establishment of a successor plan, or in the event of the sale by an Employer of substantially all of the assets of a trade or business or the sale of a subsidiary of an Employer, provided that in the case of such a sale the Member continues employment with the buyer, the entire amount to the credit of the Member's Accounts may be distributed, in the [administrator's] discretion . . . .

The Internal Revenue Code permits employers to make retroactive amendments to stock bonus plans such as the

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[2] Presumably, the class would not include those employees who elected to have their accounts remain in the Plan. While the district court identified the class as all those employed at St. Bernard plant who were Plan participants, the motion for certification specifically targeted those St. Bernard employees who "were subject to the allegedly improper calculation." Those employees, if any, who elected to remain in the Plan would not have been affected, and therefore should not be included in the class.

Plan here, effective as of the first day of the plan year. 26 U.S.C. § 401(b). Thus, we must also consider this amended provision in determining whether the trustees had discretion.

Section 8.07 of the Plan provides that the committee "from time to time shall establish rules for the administration of the Plan and the transaction of its business. The determination of the Committee as to any disputed question shall be conclusive." Plans with similar language have been held to invoke the arbitrary and capricious review standard. See, e.g., Johnson v. Eaton Corp., 970 F.2d 1569, 1571-72 (6th Cir. 1992) (holding arbitrary and capricious standard applicable given plan's terms that administrator "shall have all such powers and authority as may be necessary to carry out the provisions of the Plan," that administrator may "establish rules for the administration of this Plan . . . and [to] determine the application of such rules," and that administrator's decision on the denial of claims "shall constitute the final disposition under [the] Plan."); Callahan v. Rouge Steel Co., 941 F.2d 456, 459 (6th Cir. 1991) (holding arbitrary and capricious standard applicable given plan's terms that "[f]inal decisions shall be made by the Company as to the interpretation and application of this policy," and that fiduciary is granted "discretionary authority . . . [to] construe the terms of the plan."). In this case, the administrator's power to resolve disputes over the terms of the Plan, including the distribution, is evident by the administrator's authority under section 8.07 to have its decisions over any disputed question be deemed conclusive. See Johnson, 970 F.2d at 1572. Given the language in sections 8.02 and 8.07, as well as the language in section 7.01(c), I would review Quantum's interpretation of the phrase "termination of employment" under an arbitrary and capricious standard. The majority limits section eight's discretion to disputes as to the meaning and application of any rules the committee might estab-

lish pursuant to the first sentence of section 8.01. That first sentence reads:

> The general administration of the Plan and the responsibility for carrying out the provisions of the Plan shall be placed in a committee of not less than three persons appointed from time to time by the Board of Directors to serve at the pleasure of the Board of Directors.

I cannot read the sentence so restrictively, especially in view of section 8.02 which provides:

> The members of the Committee shall elect a chairman from their number and a secretary who may be but need not be one of the members of the Committee; may appoint from their number such subcommittees with such powers as they shall determine; may authorize one or more of their number or any agent to execute or deliver any instrument or make any payment on their behalf; may retain counsel, employ agents and provide for such clerical, accounting, and consulting services as they may require in carrying out the provisions of the Plan; and may allocate among themselves or delegate to other persons all or such portion of their duties under the Plan, other than those granted to the Trustee under the trust agreement adopted for use in implementing the Plan, as they, in their sole discretion, shall decide.

(Emphasis added.)

A decision of a plan administrator is not arbitrary and capricious when it is possible to offer a rational explanation, based on the evidence, for that outcome. Wells v. United States Steel & Carnegie Pension Fund, Inc., 950 F.2d 1244, 1248 (6th Cir. 1991). Thus, even if an aggrieved applicant offers a reasonable interpretation of the terms of a plan that conflicts with that of the administrator, we should not disturb the decision of the ad-

ministrator so long as that interpretation is also reasonable. Id.

I cannot find that the administrator's interpretation, that a "termination of employment" did not occur when Quantum sold its division and its employees continued to work for the purchaser without interruption, was unreasonable.

I am unable to agree that the tax cases relied on by the District Court are not helpful. The Internal Revenue Code, subsection 401(a), governs whether an employee's stock ownership plan, or any other retirement plan, is qualified for tax-favored status. Plan administrators must comply with Revenue Rulings which do not consider an employee "separated from service" where he or she continues in the same job for another employer. Rev. Rul. 79-336, 1979-2 C.B. 187 and Rev. Rul. 81-141, 1981-1 C.B. 204. The Plan had to comply with tax laws to be approved so contributions could be deductible.

At the time of the sale of the Emery Division, the Plan provided for distributions upon a participant's "termination of employment." It also permitted former employees to remain members, that is, participants in the Plan, until benefits were distributed and to defer distribution until age 70½. The Plan provides for methods of requesting distributions. Yet, plaintiffs did not formally elect distribution of their accounts. Under the terms of the Plan, a member is not entitled to distribution prior to age 65, unless he or she formally elects distribution. Thus, even if I were to agree with the majority's analysis, plaintiffs are not entitled to summary judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case Number: C-1-91-036

RUSSELL WULF and RONALD RENTSCHLER

v.

QUANTUM CHEMICAL CORP and
QUANTUM EMPLOYEE STOCK, ETC.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the Plaintiffs' Motion for Summary Judgment is

DENIED, the Defendants' Motion for Summary Judgment is GRANTED, and this case is DISMISSED.

SO ORDERED.

KENNETH J. MURPHY
Clerk

/s/ William Young, Jr.
WILLIAM YOUNG, JR.
(By) Deputy Clerk

Date 11 December 1992

[Filed Dec. 11, 1992]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-91-036

RUSSELL WULF and RONALD RENTSCHLER,
Plaintiffs,

v.

QUANTUM CHEMICAL CORPORATION and
QUANTUM EMPLOYEE STOCK OWNERSHIP PLAN
FOR HOURLY REPRESENTED EMPLOYEES,
Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiffs' Motion for Summary Judgment (doc. 14), the Defendants' Motion for Summary Judgment (doc. 15), the Plaintiffs' Errata to its Motion for Summary Judgment (doc. 17), the Plaintiffs' Response to the Defendants' Motion for Summary Judgment (doc. 21), the Defendants' Brief in Opposition to the Plaintiffs' Motion for Summary Judgment (doc. 22), Corrections to Plaintiffs' Memorandum in Opposition to the Defendants' Motion for Summary Judgment (doc. 25), Defendants' Reply Brief (doc. 26), and the Plaintiffs' Reply in Support of its Motion for Summary Judgment (doc. 27). A hearing was held on November 20, 1992 at which counsel for the parties were given a full and fair opportunity to argue the merits of their motions.

BACKGROUND

The Plaintiffs in this case are former participants in the Quantum Employee Stock Ownership Plan for Hourly Represented Employees (the "Plan"). The Plaintiffs challenge the value and timing of their Plan distributions. By the terms of the Plan, participants were entitled to valuation and distribution upon "termination of employment." On April 17, 1989, Quantum sold its Emery Division to the Henkel Corporation ("Henkel"). The Plaintiffs retained the same jobs, the same job duties, the same hourly wages, and the same supervisors they had with the Defendant. The Defendants neither valued nor distributed the accounts at the time of the sale. Henkel later refused to accept transfers of assets and liabilities of all of Quantum's retirement plans, including the Plan at issue here, as rquired by the agreement between Quantum and Henkel. Quantum amended the Plan, and thereafter valued and distributed the funds on October 31, 1989. According to the Plaintiffs, the difference in value between that of the sale date of April 17, 1989, and the valuation and distribution date of October 31, 1989 was $573,477.17.

The Plaintiffs claim that they are entitled to the valuation of the accounts on the sale date. According to the Plaintiffs, upon the sale of the Emery Division, the Plaintiffs' employment was effectively "terminated" within the meaning of the Plan. According to the Plaintiffs, they were entitled to valuation and distribution of the funds on that date.

The Defendants contend that the employees were not terminated within the meaning of the Plan. Therfore, according to the Defendants, the Plaintiffs were not entitled to valuation and distribution of the funds until the Defendants retroactively amended the Plan, thus enabling distribution as of October 31, 1989.

STANDARD OF REVIEW

The narrow question that we must decide on a motion for summary judgment is whether there exists a ". . . genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether issues exist that should be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982).

The moving party "has the burden of showing *conclusively* that there exists no genuine issues as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.) (emphasis in original), *cert. dismissed*, 444 U.S. 986 (1979). Moreover, "while the movant's papers are to be closely scrutinized, those of the opponent are to be viewed indulgently." *Id.* at 63. "[T]he District Court [is] obligated to consider not only the materials specifically offered in support of the motion, but also all 'pleadings, depositions, answers to interrogatories, and admissions' properly on file and thus properly before [the] court." *Id.* (quoting Rule 56(c), Fed. R. Civ. P.).

DISCUSSION

Both parties agree that by the terms of the Plan the Defendants had an obligation to value and distribute the funds upon "termination of employment." The core of our concern with respect to these motions to dismiss is the definition of the term "termination of employment." The Plaintiffs claim that the term encompasses the sale of the Defendants' Emery division to Henkel. The Defendants claim that where an employer transfers a division or subsidiary, and a given employee retains the same job, the same job duties, the same hourly wages, and the same supervisors they had with the seller company, the em-

ployees have not been "terminated" as contemplated by the Plan. Consequently, according to the Defendants, under such circumstances, the Defendants would not be required to value and distribute the funds.

We find the Defendants' argument persuassive and, therefore, hold that the Defendants were under no obligation to distribute the funds nor value the stock on April 17, 1989, the date of sale. We thus hold, that the Defendants are entitled to summary judgment as a matter of law.

The transfer of a subsidiary or a division in which the employees retain the same job responsibilities, wage, supervisor, etc. is not a "termination of employment." To qualify as a "termination of employment," the employee would have to immediately assume new responsibilities from the new employer, or actually sever the employment relationship with the new employer "by going to work for an unrelated business." *Miller v. United States,* 683 F. Supp. 166, 168 (W.D. Tex. 1988); *see United States v. Haggart,* 410 F.2d 449 (8th Cir. 1969); *United States v. Johnson,* 331 F.2d 943 (5th Cir. 1964); *see also Board of Education of Muhlenberg County Kentucky v. United States,* 920 F.2d 370, 375-76 (6th Cir. 1990). An employee, therefore, who continues to work without interruption on comparable terms for the purchaser of their employer's business, has not been "terminated" by the sale. *Harper v. R.H. Macy & Co., Inc.,* 920 F.2d 544, 545 (8th Cir. 1990).

Consequently, employees who are immediately rehired by the selling employer's successor, under terms comparable to those they received from the initial employer, are not entitled to plan benefits as "terminated employees" *See id*; *Wilbur v. Atlantic Richfield Retirement Plan,* 765 F. Supp. 891, 896 (W.D. La. 1991) (employees "who immediately went to work for the successor employer . . . without missing a day of employment, were not '*terminated from employment*' ") (emphasis in origi-

nal). Therefore, the former Quantum employees who continued to work without interruption for Henkel had not been "terminated" for purposes of the plan. *Id*; *Harper,* 920 F.2d at 545. Thus, as the Plaintiffs were not "terminated" on the date of sale, the Defendants consequently, were neither required to, nor permitted to, value and distribute the funds on that date.

The Plaintiffs contend that the Defendants issued summaries of the Plan's terms which support the Plaintiffs' definition of "termination of employment." The Plaintiffs also claim that Mr. Neff, a personnel official for the Defendants, made certain binding representations of the terms of the Plan which are inconsistent with the Defendants' definition of "termination of employment." The Plaintiffs claim, therefore, that the Defendants should be "estopped" from asserting their interpretation of "termination of employment." We agree with the Defendants that the representations do not bind them to the Plaintiffs' interpretation of the term "termination of employment."

In support of their argument that the summaries are binding, the Plaintiffs cite *Edwards v. State Farm Mutual Automobile Insurance Co.*, 851 F.2d 134 (6th Cir. 1988). This case is distinguishable in that it involved Summary Plan Descriptions, or "SPD's," under ERISA. SPD's are binding descriptions and interpretations of the terms of an ERISA plan. The descriptions involved here, as the Plaintiffs readily admit, were not SPD's for ERISA purposes, nor did any ever exist. See Plaintiffs' Motion for Summary Judgment, Doc. 14, at 5, n. *. The Summaries in question lack the necessary elements to qualify as a binding SPD under ERISA. *See,* 29 C.F.R. § 1022(b).

Finally, the summaries, even if they were binding SPD's, which as discussed above, they are not, neither refer to nor purport to address the definition of "termination of employment." The informal, single page summaries—referred to by the Plaintiffs as a memo and a newsletter (Plaintiffs' Motion for Summary Judgment,

Doc. 14, at 5, n. *)—simply refer to what occurs "when an employee *leaves* Quantum." These passing references to "leaving Quantum" in no way amplify or interpret the meaning of "termination of employment" as that term is used in the Plan itself. For example, "leaving Quantum" could refer to, without distinction, an employees death or termination of employment, even though the Plan clearly distinguishes how distributions are made to members or their beneficiaries upon each of those events under the terms of the Plan. Thus, due to this imprecise language, it cannot realistically be argued that the memo and newsletter in any way accurately refer to, much less define, the term "termination of employment." The Plaintiffs, therefore, could not have reasonably relied on the summaries.

Finally, there is not a shred of evidence in the record that the Plaintiffs relied on or changed their position in any way, on the alleged oral representations of Mr. Neff. Thus, even if Mr. Neff had made oral representations inconsistent with the Defendants' definition of "termination of employment," they would not be binding on the Defendants in this case. *See Kane v. AETNA Life Ins.*, 893 F.2d 1283, 1285 (11th Cir.), *cert. denied*, 111 S. Ct. 232 (1990); 28 Am. Jur.2d *Estoppel and Waiver*, § 27 (1966); *see also Jacobs v. Provident Life And Acc. Ins. Co.*, 837 F.2d 213, 214 (5th Cir. 1988).

CONCLUSION

Because the parties agree on the material facts of this case, the dispositive issue to be resolved is the proper definition of the term "termination of employment." We find that the Defendants' former employees who continued on with Henkel in the same position with the same job responsibilities, wage, supervisor, etc., were not "terminated" within the meaning of the Plan. Therefore, the Defendants were neither required to value nor distribute the funds on the date of sale. Thus, the Defendants are entitled to summary judgment as a matter of law.

Accordingly, the Plaintiffs' Motion for Summary Judgment is DENIED, the Defendants' Motion for Summary Judgment is GRANTED, and this case is DISMISSED.

SO ORDERED.

/s/ S. Arthur Spiegel
S. ARTHUR SPIEGEL
United States District Judge

Dated: 12/12/92

[Filed Jul 27, 1994]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3061

RUSSELL WULF; RONALD RENTSCHLER,
Plaintiffs-Appellants,

v.

QUANTUM CHEMICAL CORPORATION; QUANTUM EMPLOYEE STOCK OWNERSHIP PLAN, FOR HOURLY REPRESENTED EMPLOYEES,
Defendants-Appellees.

ORDER

BEFORE: KENNEDY and MILBURN, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Kennedy would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

NO. 94-750

In The
Supreme Court of The United States
October Term 1994

QUANTUM CHEMICAL CORPORATION and QUANTUM EMPLOYEE STOCK OWNERSHIP PLAN FOR HOURLY EMPLOYEES,
Petitioners,

v.

RUSSELL WULF, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Plan provided in Article 7 for distribution upon "termination of employment", which was not a defined term under the Plan. "Employee" was a defined term under Section 1.14 and Section 1.15 of the Plan, and denoted a person employed by Quantum.

Article 8 of the Plan, headed "Administration of Plan", contained eleven subparts, running from Section 8.01 through Section 8.11, with different sections covering the appointment, duties, action, and conduct of a committee. Section 8.07, headed "Establishment of Rules", was the only subsection expressing allowance of any discretionary power.

Article 12 of the plan, the last section, was headed "Construction", and provided that the plan was to be

construed under ERISA and the laws of the state of New York, and that the masculine included the feminine where appropriate.

Quantum had given the Plan participants, prior to the sale, written descriptions of the Plan indicating that distributions were payable upon termination of employment with Quantum. The evidence below was contradictory as to whether a Quantum official did or did not tell employees orally that a distribution would be determined and paid immediately after the sale - with Plaintiffs contending that he did - but there was no evidence that Quantum informed them that a distribution would not be made or that other plans were under consideration.

The Court of Appeals expressly noted that no particular magic language was necessary to create discretion in administering a plan, and went on to hold that:

> ...each plan must be read in its entirety and language claimed to create the required degree of discretion must be examined in context. Bearing in mind that a grant of discretion is not "an all-or-nothing proposition", we conclude that §8.07 is properly construed to mean that conclusiveness of the committee's determination is limited to disputes over the meaning and application of any rules it might establish pursuant to the first sentences of that section. Section 8.07 clearly deals with rules for administration of the Plan, not with interpretation of the language of the Plan.
>
> -Pet. App. 9a

The Court of Appeals went on to interpret the Plan, reviewing the Plan language, the Plan's purposes, and the Company's written statements concerning the Plan, as well as prior tax and ERISA cases. The Court then determined that there had been a termination of employment under the Plan. It did not use the term "legally correct" (Pet. p. 5) in its decision.

ARGUMENT

I. Petitioners' First "Question Presented" Presents No Issue Warranting Review.

Petitioners' first "Question Presented" is:

> Should this Court intervene to resolve a conflict among the Circuits concerning whether a retirement plan invokes a deferential standard of review if it grants fiduciaries such authority as "conclusive" decision-making power "as to any disputed question"?
>
> -Pet. p. (i)

This Court said in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989):

> ...we hold that a denial of benefits challenged under §1132 (a) (1) (B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.
>
> -489 U.S. 101 at 115

Petitioners present their question as involving a plan granting power "as to any conclusive question" without noting that the language they quote was within, and confined to, a subsection headed "Establishment of Rules". The language did not purport to confer discretion to "determine eligibility for benefits" or "to construe the terms of the plan".

> Petitioners urge the Court to grant certiorari
>
> to revisit Bruch and to purge the contra proferentem doctrine and other artificial presumptions established to frustrate settlor intent.
>
> -Pet. p. 15

With respect, this would not be appropriate. The Court of Appeals did not even mention the contra proferentem doctrine, or apply anything else that could be characterized as an artificial presumption.

Petitioners express approval of a 1991 Bruch decision and a 1992 Bruch decision by the Sixth Circuit

(Pet. p. 10, n. 7), and approval and disapproval of a number of Bruch decisions by other circuits. The only conclusion that is apparent from the whole array, however, is that Petitioners approve of cases where a deferential standard is applied and disapprove of those where a de novo standard is applied. Nothing approaching a split between circuits, or even "inconsistent internal precedent" (Pet. p. 10), is demonstrated.

II. Petitioners' Second "Question Presented" Presents No Issue Warranting Review.

Petitioners' second "Question Presented" is:

> Should a court disregard relevant Internal Revenue Service positions when it reviews an interpretation of a retirement plan intended to qualify for tax-favored treatment under the Internal Revenue Code?
>
> -Pet p. (i)

Petitioners bias the question presented to this Court by asking whether a court should "disregard" "relevant"

information - in particular "relevant Internal Revenue Service positions". Obviously a court should not disregard anything relevant, but the court below did not come close to doing so - it simply refused to give controlling weight to something insignificant.

The IRS position that Petitioner apparently refers to is that taken in Private Letter Ruling No. 8614060 (June 13, 1986) (Pet. p. 19, n. 7). The private ruling - which, under 26 U.S.C. §6110 (j) (3), may not "be used or cited as precedent" - suggested that a distribution to same-desk employees might affect plan qualification under §401. A 1990 memorandum, however, clarified the confusion caused by the 1986 letter ruling. The memo, G.C. Memorandum 39824 (1990), said:

> the term "severance from employment", as used in Rev. Rul. 56-693, 1956-2 C.B.282, for purposes of determining whether a pension plan qualified under section 401(a) may make distributions, does not have the same meaning as"separation from the

service", as used in section 402(e)(4)(A)(iii) for purpose of determining whether a distribution is a "lump sum distribution". A determination as to whether a severance from employment has occurred should be made on the basis of whether or not the employee continues to be employed by the employer maintaining the plan (determined using the criteria described below) rather than on the basis of whether the employee continues to work on the same job for a different employer as a result of liquidation, merger, or consolidation, etc.

....

...[w]hen the employment relationship between an employee and the employer maintaining a pension plan is severed before the employee retires, a distribution of benefits to the employee from that pension plan after severance of the employment relationship with that employer is not inconsistent with the concept of a pension plan that meets all of the requirements of section 401(a).

-I.R.S. General Counsel Memorandum 39824 (1990)

There is not the slightest evidence that the tax issue reflected above had any effect on the thinking or the

drafting by the Company in 1988, or the Plan's thinking early in 1989 when it did not make a distribution or late in 1989 when it did make a distribution. Nor is there anything to indicate what effect it might logically have had. The Court of Appeals was correct in determining - not that IRS positions are irrelevant, which it did not say - but that the historical position argued by Petitioners was not material.

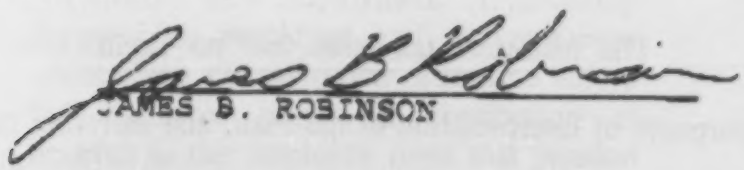
The historical tax issue had no significance for purposes of interpretation of the Plan, and therefore there was no ground for the court to give it the controlling significance in Petitioners' favor that Petitioners now seek. Certainly it provides no ground for review by this Court.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge that the Petition be denied.

Dated: November 22, 1994

Respectfully submitted,



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No. 94-750

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

QUANTUM CHEMICAL CORPORATION and
QUANTUM EMPLOYEE STOCK OWNERSHIP PLAN
FOR HOURLY EMPLOYEES,
Petitioners,

v.

RUSSELL WULF, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. THIS CASE DOES PRESENT AN OPPORTUNITY FOR THE COURT TO RESOLVE THE SPLIT IN THE CIRCUITS REGARDING WHAT PLAN LANGUAGE IS REQUIRED TO INVOKE A DEFERENTIAL STANDARD OF REVIEW

A. The Sixth Circuit Did Employ A Presumption To Determine Whether The Plan Invoked A Deferential Standard Of Review

Despite the plaintiffs' insistence to the contrary, both the language and the effects of presumptions have crept into the caselaw, from the Sixth and certain other Circuits, in applying the deferential review standards of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Certainly the sounds of presumptions echo throughout the majority's opinion below. Citing *Anderson v.*

Great West Life Assur. Co., 942 F.2d 392 (6th Cir. 1991), the majority emphasized that the settlor's grant of decision-making authority must be "clear" and "the exception." (Petitioners' App. 8a) In addition, in applying a tightly constricted interpretation of the Plan's grant of authority, the majority cited to and relied upon the Eleventh Circuit's decision in *Kirwan v. Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994), which presumes that, when a plan is "ambiguous as to an Administrator's discretionary authority, we *will* apply the *de novo* standard of review." *Id.* at 789 (emphasis added). (Petitioners' App. 10a)[1]

The best evidence of presumptions, as well as the truest indicator of conflict among the Circuits, appears in the results. The Sixth Circuit majority insisted, for example, that "the placement of the reference to finality of the committee's determinations of disputed questions in the section granting authority to make rules does not indicate a clear grant of discretion to interpret the language of the Plan generally." (Petitioners' App. 9a) By somehow finding that the Plan § 8.07's unlimited rule-making authority limits fiduciary authority, the majority's reading simply cannot be squared with the Fourth Circuit approach exemplified by *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989), and *Boyd v. United Mine Workers Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989).[2]

---

[1] Although the Sixth Circuit did not admit to using the doctrine of *contra proferentum*, that doctrine is indicative of the artificial hurdles that the Sixth Circuit and certain other Circuits have placed in the path of settlors trying to invoke deferential review.

[2] Had the committee promulgated a formal rule interpreting "termination of employment," the Sixth Circuit majority apparently would have deferred to the committee. The majority does not explain, however, how the Committee's *failure to exercise* that authority could contradict the settlor's intent as to *the existence of* the necessary authority. *See Diaz v. Seafarer's International Union*, 13 F.3d 454, 457 (1st Cir. 1994) ("Given that the Trustees have the authority to *formulate* the rules and regulations that implement the Plan . . ., it is not subject to question that the Trustees have

As noted by a commentator on the *Wulf* case:

> Since every plan we have encountered describes the committee's discretion in the section of the plan granting power to make rules, this last observation could be used to call into question all grants of discretion to committees (at least in cases where the grant does not specifically note that it extends to questions involving interpretation of the plan language).

Rizzo, *6th Circuit Opinion May Halt Plan Spinoffs and Mergers*, 3 ERISA Litigation Rep. No. 4 3, 5 (1994).

B. A Split In The Circuits Does Exist Regarding What Plan Language Is Required To Invoke A Deferential Standard Of Review

The plaintiffs, citing to no authority, boldly assert that this petition demonstrates "[n]othing approaching a split between circuits, or even 'inconsistent internal precedent.'" (Respondent's Brief In Opposition, p. 6). That assertion is belied by the contradictory tests and results detailed in the Petition. (Petition, pp. 8-16). As early as 1990, the Seventh Circuit noted that the "circuit courts appear split over the degree of plan language specificity required to trigger deferential review of trustee determinations." *Diaz v. Seafarers International Union*, 13 F.3d at 457 (citing *Sisters of the Third Order of St. Francis v. SwedishAmerican Group Health Benefit Trust*, 901 F.2d 1369, 1371 (7th Cir. 1990)). In the nearly five years since the Seventh Circuit's decision in *Sisters of St. Francis*, that split, rather than narrowing, has grown wider and more confusing for the plan sponsors and fiduciaries who must comply with the terms of their ERISA plans.

---

the . . . discretion to *interpret these rules and regulations* . . ." (quoting *Lockhart v. United Mine Workers of America 1974 Pension Trusts*, 5 F.3d 74, 78 n.6 (4th Cir. 1993) (emphasis in original)).

II. THIS CASE DOES PRESENT AN OPPORTUNITY TO CLARIFY THE SIGNIFICANCE OF INTERNAL REVENUE SERVICE POSITIONS IN INTERPRETING TAX-QUALIFIED PENSION PLANS

In their Brief in Opposition, the plaintiffs do not dispute that Quantum's second question is worthy of certiorari—[s]hould a court disregard relevant Internal Revenue Service positions when it reviews an interpretation of a retirement plan intended to qualify for tax-favored treatment under the Internal Revenue Code? Rather, the plaintiffs contend only that this case does not present the above question to the Court, on the theory that the Internal Revenue Service ("Service") positions involved here were "insignificant." (*Id.*)

Contrary to the plaintiffs' assertion, this case squarely presents the issue for review. The evidence demonstrates that the Service's guidance on the meaning of "termination of employment" and similar terms [3] *at that time* played a key role in Quantum's actions. (Sixth Circuit Joint Appendix, Vol. II, pp. 374, 415-16) Plaintiffs concede that, at the time Quantum sold its Emery Division in April 1989, the Service had indicated that its "same desk rule," which holds that a "separation from service" does not occur where an employee continues in the same job for another employer, applied to Code plan qualification requirements. *See* Private Letter Ruling 8614060 (June 13, 1986). The tax qualification of the Plan is hardly an "insignificant" consideration.

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[3] Under the Internal Revenue Code ("Code") and ERISA, a number of important participant rights hinge upon whether a "termination of employment," a "severance from employment" or a "separation from service" has occurred with respect to a plan participant. *See, e.g.*, Code § 401(k)(2)(B)(i)(I) (distribution from a cash or deferred arrangement permissible upon a "separation from service"), Code § 402(d)(4) (availability of preferential tax treatment upon a "separation from service") and Revenue Ruling 56-693, 1956-2 C.B. 282 (pension plan payment of benefits prior to "severance from employment" disqualifies the plan). Over the years, the Service has issued considerable guidance defining these terms in various contexts.

The Service positions involved here were significant and relevant because of their potential impact on the Plan's tax-exempt status. As this case demonstrates, a court's failure to consider that impact may have far-reaching and unintended results. As one commentator on the *Wulf* case stated:

> Every once in awhile a reported decision will send tremors through the benefits community when a court interprets a term that is found in most employee benefit plans without appreciating the implication the decision could have on a benefits practice that has existed since the enactment of ERISA. *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368 (6th Cir. 1994) . . . is such a decision. If the reasoning in *Wulf* is followed in other circuits, there will be a chilling effect on plan spinoffs and mergers in corporate transactions, which over the long term will negatively impact the benefit security of plan participants; the short term may see a flurry of potential claims reported under fiduciary responsibility and malpractice policies.
>
> * * * *
>
> Judge Lively made a fatal detour when he then interpreted "termination of employment" in a literal sense without considering how that term had been interpreted by the [Service] in the context of plan qualification requirements. It is doubtful that the court would have reached the same conclusion if it had understood that its interpretation could result in the disqualification of pension plans and cash or deferred plans ("401(k) plans") that are transferred to or assumed by a buyer in a corporate transaction.

Rizzo, *6th Circuit Opinion May Halt Plan Spinoffs and Mergers*, 3 ERISA Litigation Rep. No. 4 at 3, 9.

To require, as the majority of the Sixth Circuit did in this case, plan administrators to interpret ERISA plans without at least one eye toward Code interpretations by the Service creates an irreconcilable conflict for ERISA plan fiduciaries, who must attempt to comply with both

statutes. That conflict, contrary to the plaintiffs' assertion, is highly significant, both for this Plan and for every other pension plan that is caught in a corporate transaction. This case, of far-reaching consequences, clearly presents a question that warrants review by this Court.

CONCLUSION

For the reasons stated above, petitioners Quantum Chemical Corporation and Quantum Employee Stock Ownership Plan for Hourly Employees request this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals of the Sixth Circuit.

Respectfully submitted,

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